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09/601,029	07/26/2000	PETER HIMMELSBACH	BEIERSDORF-6	5165
7055 7590 03/16/2011 GREENBLUM & BERNSTEIN, P.L.C. 1950 ROLAND CLARKE PLACE RESTON, VA 20191			EXAMINER PIZIALI, ANDREW T	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PETER HIMMELSBACH and
MARIKE SINNEN

Appeal 2010-004771
Application 09/601,029
Technology Center 1700

Before BRADLEY R GARRIS, PETER F. KRATZ, and
MARK NAGUMO, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the "MAIL DATE" (paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 37-98. We have jurisdiction under 35 U.S.C. § 6.

We AFFIRM.

Appellants claim a backing material for medical purposes wherein the backing material comprises a nonwoven, overstitched by yarns with a number of stitches of at least 3/cm of web and an adhesive composition which contains a pharmacologically active substance (claim 37). Appellants also claim a similar backing material wherein the nonwoven is reinforced by stitches formed by loops from fibers of the nonwoven (claim 69).

Representative independent claims 37 and 69 read as follows:

37. A backing material for medical purposes, wherein the backing material comprises a nonwoven, overstitched by yarns with a number of stitches of at least 3/cm of web, and an adhesive composition on at least a part of at least one side of the nonwoven, the adhesive composition being a hot melt composition comprising one or more block copolymers wherein at least one block comprises styrene, the adhesive composition further comprising at least one pharmacologically active substance.

69. A backing material for medical purposes, wherein the backing material comprises a nonwoven which is reinforced by stitches formed by loops from fibers of the nonwoven, a number of stitches being at least 3/cm of web, and an adhesive composition on at least a part of at least one side of the nonwoven, the adhesive composition being a hot melt composition comprising one or more block copolymers wherein at least one block comprises styrene, the adhesive composition further comprising at least one pharmacologically active substance.

The following references are relied upon by the Examiner in the rejections before us:

Wildeman et al.	3,967,472	July 6, 1976
Tomiooka et al.	4,722,857	Feb. 2, 1988
Cilento et al.	5,059,189	Oct. 22, 1991
Lucast et al.	5,407,717	Apr. 18, 1995
Kantner et al.	5,489,624	Feb. 6, 1996
Merkle et al.	5,527,536	Jun. 8, 1996
Koketsu et al.	5,547,223	Aug. 20, 1996
Fischer et al.	5,863,977	Jan. 26, 1999
Bodenschatz et al.	6,074,965	Jun. 13, 2000
Lucast et al.	6,479,073 B1	Nov. 12, 2002
Albrod et al.	6,555,730 B1	Apr. 29, 2003

Under 35 U.S.C. § 103(a), the Examiner rejects:

claims 37-43, 45-52, and 55-65 as unpatentable over Merkle in view of Lucast 073 and further in view of Koketsu;

claims 69-73, 75-82, and 85-95 as unpatentable over these references and further in view of Wildeman; and

the remaining claims on appeal as unpatentable over various combinations of the above references and the other previously listed prior art.

Under the judicially created doctrine of obviousness-type double patenting, the Examiner rejects:

claims 37-52, 55-65, 69-82, and 85-95 as unpatentable over claims 1-27 of Albrod in view of Merkle; and

the remaining claims on appeal as unpatentable over claims 1-27 of Albrod in view of Merkle in various combinations with other previously listed prior art.

We sustain each of the rejections on appeal for the reasons expressed in the Answer and below.

Regarding the § 103 rejection of claim 37, Appellants argue that no motivation exists for using a nonwoven of the type taught by Lucast 073 as the backing material of Merkle (App. Br. 13-16) and that an artisan would have been discouraged from such use because Merkle's active substance is a readily volatile liquid which allegedly might evaporate through and/or ooze out of a nonwoven backing material (*id.* at 16).

This argument is unpersuasive.

As correctly explained by the Examiner, it would have been obvious for an artisan to use a nonwoven as Merkle's backing material motivated by a reasonable expectation of success based on the evidence provided by Lucast 073 that a nonwoven would be suitable for such use (Ans. 3-4, 22). Moreover, like the Examiner (*id.* at 23), we find no convincing merit in Appellants' argument that an artisan would have been discouraged from such use because the readily volatile liquid of Merkle allegedly might evaporate through and/or ooze out of a nonwoven backing material. Appellants have provided this record with no evidence in support of their allegation. Further, this allegation appears to be incompatible with the fact that Merkle's liquid is in admixture with the adhesive for attaching the patch of Merkle to a user's skin.

Appellants also argue that Koketsu is nonanalogous art and therefore would not have suggested providing the nonwoven backing material of Merkle/Lucast 073 with overstitching by yarns, particularly wherein the number of stitches is at least 3/cm as required by claim 37 (App. Br. 16-18).

However, we agree with the Examiner that Koketsu is analogous art because it is reasonably pertinent to the particular strength problem with which Appellants were concerned (Ans. 24). Significantly, Appellants do not contest with any specificity the Examiner's determination that Koketsu is reasonably pertinent to the strength problem addressed by Appellants (*cf.*, Reply Br. 5). We additionally agree with the Examiner that Koketsu would have suggested increasing strength by increasing the number of stitches per unit length, thereby supporting the conclusion that it would have been obvious to overstretch with a number of stitches of at least 3/cm as claimed by Appellants (Ans. 3-4, 24).

As for the § 103 rejection of claim 69, Appellants additionally argue that an artisan would not have been motivated to provide the nonwoven backing material of Merkle/Lucast 073/Koketsu with the type of stitches disclosed by Wildeman and required by claim 69 (App. Br. 19-20).

We cannot agree. For the reasons detailed by the Examiner, it would have been obvious for an artisan to provide the nonwoven backing material with the type of stitches taught by Wildeman in order to obtain the benefits associated with such stitches (Ans. 11-12, 25-26).

Appellants present separate arguments regarding the § 103 rejections of some of the dependent claims. These arguments are unpersuasive for the reasons expressed in the Answer.

For example, the Examiner is correct that claimed characteristics such as the ultimate tensile strength of claim 39 would be inherently possessed by the overstretched, nonwoven backing material suggested by the applied prior art (Ans. 26). These advantageous characteristics would flow naturally from following the above discussed suggestions for combining the applied

reference teachings. *See Ex parte Obiaya*, 227 USPQ 58, 60 (BPAI 1985) ("[t]he fact that appellant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious"). As another example, Appellants provide no support for their apparent belief that claims 64 and 94 distinguish over the applied prior art by requiring that the backing material comprises a wound pad or a padding. On this record, the claimed wound pad or padding is indistinguishable from the overstitched, nonwoven backing material suggested by the applied references.

For the reasons set forth above and in the Answer, Appellants' arguments reveal no reversible error in the Examiner's § 103 rejections of the appealed claims.

Concerning the obviousness-type double patenting rejection of independent claims 37 and 69, Appellants state that they "are unable to see how in view of the fundamental differences between MERKLE and the claims of ALBROD with respect to, e.g., the backing layers thereof one of ordinary skill in the art would be motivated to combine the claims of ALBROD with the teachings of ALBROD [sic, MERKLE]" (App. Br. para. bridging 34-35). Appellants also reiterate their previously discussed argument that an artisan would have been discouraged from making the proposed combination because the readily volatile liquid of Merkle allegedly would be expected to readily evaporate and/or escape through the porous nonwoven backing material claimed by Albrod (*id.*).

We agree with the Examiner that an artisan would have provided the adhesive of the nonwoven backing material claimed by Albrod with a pharmacologically active substance as taught by Merkle in order to obtain the medical function associated with this active substance (Ans. 18). Contrary to Appellants' argument, an artisan would not have been discouraged from making this provision for the reasons given above and in the Answer (Ans. 31).

We observe that Appellants do not separately argue the obviousness-type double patenting rejections of the dependent claims including the separately rejected dependent claims.

Under these circumstances, Appellants' arguments fail to reveal any reversible error in the obviousness-type double patenting rejections before us.

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1).

AFFIRMED

bar

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